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Filing date: **04/21/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91207333
Party	Defendant IP Application Development LLC
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Signature	/Allison Buchner/
Date	04/21/2016
Attachments	[062] 2016-04-21 - IPAD LLC Reply ISO Motion for Summary Judgment w Hill Decl and Exhs - PUBLIC.pdf(353518 bytes)

¹ IPAD LLC is entitled to a priority date in 2009 for its ‘563 application and 2010 for its ‘446 application. (See D.E. 52 at 1 n.1, 13–14 & n.14; *see also infra* Section III.B.) Tellingly, the bulk of RxD’s alleged evidence of use post-dates IPAD LLC’s priority dates, and is thus irrelevant.

to support its opposition. *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1359 (Fed. Cir. 2001). Because RxD has no prior protectable rights in the term “ipad,” its opposition should be dismissed.

I. RESPONSE TO RxD’S IMPROPER EVIDENTIARY OBJECTIONS

RxD improperly embeds a motion to strike into its Opposition Brief, which violates TBMP § 502.02(b). RxD’s motion to strike should be denied on that basis. *Nature’s Path Foods, Inc. v. Mary’s Gone Crackers, Inc.*, 2015 WL 9702638, at *2 n.13 (T.T.A.B. Dec. 29, 2015). Even if RxD’s motion were properly filed, it fails on the merits. Citing Trademark Rule 2.127(e), RxD claims, wrongly, that certain of IPAD LLC’s documents should be stricken for failure to “produce and identify the [discovery] requests to which the documents are responsive.” (Opp’n. at 2–3.) In fact, Rule 2.127(e) provides only that the Board will consider, *inter alia*, a request for production and the documents or things produced in response thereto on a motion for summary judgment. And TBMP § 528.05(b), which RxD ignores, permits parties to submit affidavits (or declarations) with exhibits, as IPAD LLC did. *See also Frank Lin Distillers Prods., Ltd. v. NJoy*, 2016 WL 837731, at *5 (T.T.A.B. Feb. 5, 2016) (non-precedential).

RxD’s other evidentiary objections are also unavailing. Its FRE 106 “completeness” objections are unfounded because IPAD LLC submitted the entirety of the underlying evidence (*e.g.*, deposition excerpts, printouts from RxD’s website) with its motion. RxD’s desire to “explain away” its testimony and documents is not a basis for an objection. Equally meritless are RxD’s objections under FRE 403. *See Ava Ruha Corp. v. Mother’s Nutritional Ctr., Inc.*, 113 U.S.P.Q.2d 1575, 2015 WL 496141, at *3 (T.T.A.B.) (FRE 403 objections are misplaced in Board proceedings).

II. RESPONSE TO RxD’S COUNTERSTATEMENT OF FACTS²

RxD’s gross misrepresentations of fact relating to *IPAD LLC*’s use of its IPAD mark amount to nothing more than a red herring designed to distract attention from RxD’s own lack of protectable rights. For example, RxD asserts that [REDACTED] (Opp’n at 9.) That is untrue, as shown by IPAD LLC’s written discovery and document productions.

² For relevant factual background relating to IPAD LLC’s selection, adoption, and use of its mark, IPAD LLC respectfully refers the Board to its Motion for Summary Judgment. (D.E. 52 at 2–12.)

(See, e.g., D.E. 55, Sakagami Decl., Ex. C at 5–6 ([REDACTED]); see also IPAD LLC’s Opp’n. to Mot. to Amend, filed concurrently herewith, at 4–7.)

RxD also incorrectly asserts that [REDACTED] but RxD misleadingly cites evidence referring only to [REDACTED] (Opp’n. at 9, 11.) Setting aside the fact that use is not required at this stage for IPAD LLC’s ITU applications, the fact is that, as IPAD LLC’s corporate designee Tom La Perle testified, IPAD LLC *has* used the IPAD mark in connection with services, and has current plans to continue increasing those offerings ([REDACTED]). (Suppl. Hill Decl., filed concurrently, Ex. 70 (“La Perle Dep.”) 117:24–122:12.) Douglas Vetter, Apple’s Vice President, Associate General Counsel, and Assistant Secretary confirmed as much, indicating that [REDACTED] [REDACTED]. (Suppl. Hill Decl., Ex. 72 at 59:22–60:20.) These plans are consistent with Apple’s model of offering an entire “ecosystem . . . of services” beyond its device offerings. (La Perle Dep. 120:1–8.)

RxD also alleges that IPAD LLC [REDACTED] [REDACTED] (Opp’n at 5.) RxD offers no evidentiary support for these false assertions. In fact, as RxD admits, IPAD LLC’s [REDACTED] [REDACTED] which yielded *more than 3,000 pages* [REDACTED], all of which were produced in discovery. (Suppl. Hill Decl. ¶ 4; see also Opp’n to Mot. to Amend at 3.) RxD’s assertion that [REDACTED] [REDACTED] are disingenuous at best: As Mr. La Perle explained, [REDACTED] [REDACTED]. (La Perle Dep. 106:9–22.)

Notwithstanding RxD’s misrepresentations regarding IPAD LLC’s use of its IPAD mark, the following *undisputed* facts (admitted by RxD in its Opposition Brief) confirm that (1) RxD’s use of the term “ipad” is descriptive and (2) not sufficient for it to have *ever* acquired secondary meaning:

- RxD admits it used “ipad” in connection with the tag-line “Your Mobile *Internet Notepad*” to “describe [the service’s] capabilities to consumers.” (Opp’n. at 3 (emphasis added).)
- The PTO issued an office action rejecting RxD’s application to register “ipad” on the grounds that it is merely descriptive of RxD’s claimed services. (*Id.* at 7.)
- RxD has *no* evidence of consumer association. (*Id.* at 13.)
- The *only* alleged unsolicited media attention that RxD’s “ipad.mobi” website ever received consists of: (1) being featured in a dotMobi showcase in 2008;³ and (2) one-time mentions on three other “.mobi” enthusiast sites: mobility.mobi (apparently in 2008), mobilephans.blogspot.com (in 2008), and igloo.mobi (in 2010). (*Id.* at 18–19.) RxD also offers no evidence as to the circulation or viewership of any of these sources of supposed media attention.⁴
- RxD’s revenues have been “negligible.” (*Id.* at 20.) Even by 2015 (six years after IPAD LLC’s priority date), RxD still only had about 3,000 users, even including both U.S. [REDACTED] (*Id.* at 20; D.E. 52 at 4–5 & n.7.)
- RxD’s advertising for ipad.mobi has been limited to online advertisements, none of which have been widely viewed. (*See* Opp’n at 19; Clements Decl. ¶ 10, Exs. 6–7, 9–11.) RxD does not even dispute that before 2010 it spent a total of *at most* approximately [REDACTED] on advertising. (*See* D.E. 52 at 5, 19.)⁵

III. RXD HAS NO PROTECTABLE RIGHTS IN THE TERM “IPAD”

RxD cannot survive summary judgment since it cannot support its allegations with actual evidence from which a factfinder could find in its favor. *Celotex*, 477 U.S. at 323–25. To oppose IPAD LLC’s registration on the basis of a likelihood of confusion, RxD has the burden of proving proprietary rights in “ipad” by showing that its use is distinctive of its goods/services either inherently or by acquired

³ RxD asserts in its brief that the dotMobi showcase was “unsolicited” media attention, but its corporate designee testified otherwise. (Suppl. Hill Decl., Ex. 71 (“KC Dep.”) 521:6–15.) Regardless, being featured in such showcase does not show secondary meaning. (*See infra* at 8.)

⁴ Nor is there any reason to believe that these sources, all focused exclusively on .mobi sites, were ever broadly circulated, since .mobi sites never “hit mainstream” or caught the interest of anyone beyond “developers and domainers.” (D.E. 52 at 2 n.4; *id.*, Hill Decl., Ex. 5 (“Wiles Dep.”) 40:1–16.)

⁵ The only evidence RxD offers in support of its Opposition that shows *any* advertising prior to IPAD LLC’s priority date show advertising [REDACTED]. (D.E. 55, Clements Decl., Ex. 6–7.) RxD’s other “evidence” of advertising (which post-dates IPAD LLC’s priority dates) is equally unavailing, even if the law allowed for a longer period for it to acquire secondary meaning. For instance, RxD submits a document showing the viewing statistics for its YouTube campaign for the period from 2011 to 2016 (well after IPAD LLC’s priority dates), but only *two* of those advertisements include the term “ipad” and they received *zero* “clicks.” (*Id.*, Ex. 9.) Similarly, RxD’s report of its Google AdWords campaign from 2015 to 2016 shows that its *one* advertisement that used the word “ipad” received only *nine* “clicks” for that *entire* year. (*Id.*, Ex. 11.)

distinctiveness. *Hoover*, 238 F.3d at 1359 (Fed. Cir. 2001); *Otto Roth & Co., Inc. v. Univ. Foods Corp.*, 640 F.2d 1317 (C.C.P.A. 1981). Because RxD's Opposition Brief fails to meet its burden, summary judgment is warranted.

A. The Undisputed Facts Show That RxD's Use of "IPAD" Is Descriptive

RxD does not dispute the authenticity of its specimen of use showing the service on the ipad.mobi site is a "mobile internet notepad," and even admits that it used that tagline to "educate potential subscribers about the nature of its IPAD services." (D.E. 55, Clements Decl. ¶ 6.) Documents filed with RxD's Opposition Brief similarly describe ipad.mobi as a place to "jot your thoughts" and "save notes," further confirming that the intended meaning of "ipad" was "internet notepad." (*Id.*, Exs. 16–17.) This is the **only** meaning that RxD's contemporaneous documents support. (See D.E. 52 at 2–5, 10–12, 14–17.)

Attempting to create a triable issue of fact where there is none, RxD submits the declaration of its founder, Brian Clements, claiming that he intended "ipad" to mean "my pad" like a "landing spot." (D.E. 55, Clements Decl. ¶ 6; Opp'n at 14.) Even if Mr. Clements' self-serving statements were supported by any evidence, they cannot defeat summary judgment because distinctiveness is evaluated not from the perspective of the user's intent, but from the perspective of **consumers**. See, e.g., *In re Sterotaxis, Inc.*, 429 F.3d 1039, 1043 (Fed. Cir. 2005); *Otto Roth*, 640 F.2d at 1322; *Gross v. Bare Escentuals Beauty, Inc.*, 632 F. Supp. 2d 283, 289–90 (S.D.N.Y. 2008) (plaintiff's self-serving testimony supporting its interpretation of mark was insufficient to overcome summary judgment of descriptiveness).

In its Opposition, RxD cites **no evidence** as to whether consumers perceive "ipad" to mean "my landing pad," and the only **evidence** it submits regarding the "i"-prefix confirms that one meaning of "i" is "internet." (D.E. 55, Clements Decl. ¶ 6, Ex. 3.) This is consistent with the PTO's rule for i-formative marks, as well as precedent from the Board and federal courts. See TMEP § 1209.03(d); *In re Zanova, Inc.*, 59 U.S.P.Q.2d 1300, 2001 WL 460111, at *5 (T.T.A.B.) (finding ITOOL descriptive); *J.T. Colby & Co., Inc. v. Apple Inc.*, 2013 WL 1903883, at *9 (S.D.N.Y. May 8, 2013) (finding IBOOKS descriptive).

RxD's remaining arguments as to descriptiveness are contrary to the well-settled law that whether a term is merely descriptive "is determined not in the abstract" but in the context of the goods and

services for which it is being used or intended to be used, and the “possible significance that the term would have to the average purchaser of the goods or services.” *E.g., In re Sterotaxis*, 429 F.3d at 1039. Contrary to RxD’s assertions (Opp’n at 15), the test for descriptiveness does **not** require that a consumer be able to guess, from the mark itself, what the goods and services are. *In re Jonathan Davey*, 2007 WL 4135845, at *2–3 (T.T.A.B. Nov. 13, 2007) (non-precedential). Nor does it matter that “i” and “pad” might have other conceivable meanings or could describe other products (including tablet computers). *In re Internet Promise Grp. LLC*, 2014 WL 3976446, at *4 (T.T.A.B. July 29, 2014) (non-precedential); *In re Jonathan Davey*, 2007 WL 4135845, at *2–3 (other meanings of “safe harbor” in other contexts did not prevent finding descriptiveness). Nor is it necessary for a term to convey immediately an idea of each and every feature of the goods/services to be found descriptive; it suffices if the term describes one significant function. *In re Steelbuilding.com*, 415 F.3d 1293, 1299 (Fed. Cir. 2005); *accord In re Zanova*, 2001 WL 460111, at *5; *In re Styleclick.com*, 58 U.S.P.Q.2d 1523, 2001 WL 245735, at *2 (T.T.A.B.). Thus, whether ipad.mobi allowed users to store things other than lists or notes (like videos and photos) is legally irrelevant and cannot defeat summary judgment of descriptiveness.⁶

B. The Undisputed Facts Show RxD Has Not Acquired Distinctiveness in “IPAD”

Because RxD’s use of “ipad” is descriptive, it must prove that it acquired distinctiveness in the term prior to IPAD LLC’s earliest priority date (in 2009) to survive summary judgment. (*See* D.E. 52 at 1 n.1 & 14–15; *see also supra* n.1–2.) Apparently recognizing it cannot make that showing, RxD argues, contrary to applicable law, that the distinctiveness of its mark should be measured as of the **present time**,

⁶ RxD asserts that its use of “ipad” is distinguishable from the voluminous examples of third-party use submitted by IPAD LLC (D.E. 52 at 10–12) on the basis that it uses “ipad” in connection with a service, whereas third-party examples are for goods like tablet computers, but fails to cite any law suggesting that uses as to goods are less relevant than uses as to services. Moreover, RxD ignores examples of “ipad” used in connection with services, including, *inter alia*, (1) [REDACTED] (D.E. 55, Sakagami Decl., Ex. X at IPADLLC_000140–43) and (2) IPAD LLC’s multiple examples of third-party use of “pad” in connection with software and applications for creating lists, which is exactly what RxD’s ipad.mobi website service allows users to do. (D.E. 52 at 11–12 (WIKIPAD for use with “software for recording textual notes;” EASYPAD for “personal content management” and “mobile application for creating . . . notes and reminders;” ETHERPAD for “a collaborative notepad service;” TREEPAD for “personal information manager . . . that allows you to store . . . data”).)

not as of IPAD LLC's constructive use dates. RxD's argument is wrong as a matter of law. *See, e.g., Wal-Mart Stores, Inc. v. Franklin Loufrani*, 2009 WL 873129, at *6 (T.T.A.B. Mar. 20, 2009) (non-precedential) (requiring secondary meaning *prior to applicant's ITU application date*); *Threshold .TV, Inc. v. Metronome Enters., Inc.*, 96 U.S.P.Q.2d 1031, 2010 WL 3164750, at *1 (T.T.A.B.) (*same*); *Certified Printers, Inc. v. Crouser & Assoc., Inc.*, 2008 WL 5454158, at *4 (T.T.A.B. Dec. 22, 2008) (non-precedential) (*same*); *Am. Italian Pasta Co. v. Barilla Alimentare S.P.A.*, 2008 WL 2385971, at *4 (T.T.A.B. May 13, 2008) (non-precedential) (*same*).⁷ Regardless, the fact remains that RxD has not adduced evidence that *any* consumer *ever* associated the term "ipad" with RxD, and cannot make a sufficient showing as to any of the secondary meaning factors at *any* point in time.

RxD's Undisputed Sales/Revenues Do Not Support Secondary Meaning: RxD claims (without support) that its lack of sales success should not "negate a conclusion of acquired distinctiveness."⁸ (Opp'n at 20.) Given the undisputed evidence of ipad.mobi's stunning lack of sales success, this assertion is absurd. RxD admits that its revenues have been "negligible." (*Id.*; *see also* D.E. 52 at 4–6, 18–19.) Its founder has estimated that by the end of 2009 (the critical period for this motion (*see* n.2, *supra*)), it only had about [REDACTED], and RxD admits that even as late as 2015 it only had about 3,000 subscribers, including the test accounts set up by RxD's founder and spam accounts.⁹ (Opp'n at 20; *see also* D.E. 55, Clements Decl., Ex. 22; D.E. 52 at 4–6 and n.7; *see*

⁷ In support of its argument that its own distinctiveness should be measured as of *the present time*, RxD relies on inapposite cases dealing not with the distinctiveness of an *opposer's* mark (who must have a "protectable right" to support opposition) or priority of trademark right, but the distinctiveness of an *applicant's* mark. (Opp'n at 13 & n.4 (citing, *e.g., McCormick & Co., Inc. v. Summers*, 354 F.2d 668, 674 (C.C.P.A. 1966) (deciding distinctiveness of *applicant's* mark as of the date of decision); *Gen. Foods Corp. v. MGD Partners*, 224 U.S.P.Q. 479, 486 (T.T.A.B. Sept. 28, 1984) (*same*).)

⁸ Elsewhere in its Opposition Brief, RxD appears to argue that because it is a "smaller user" opposing registration by a "larger competitor," it should somehow be given greater leeway in the proof required to show distinctiveness. RxD relies on *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977), but that case held only that reverse consumer confusion is actionable, not that being a smaller entity excuses a party from proving distinctiveness where required. *Id.* at 1369. In fact, the mark in the *Big O Tire* case was not descriptive, so secondary meaning was not at issue. *Id.*

⁹ RxD has no idea how many of these users were in the United States, but claims that does not matter. (Opp'n at 4, 20.) RxD is again wrong as a matter of law. Even RxD's cited case recognizes that when

also *supra* n.5.) Far greater sales have been deemed insufficient to show secondary meaning, and RxD has not cited a single case to the contrary. *Integrated Mgmt. Info., Inc. v. Barrie*, 2013 WL 2365031, at *4–6 (T.T.A.B. Jan. 22, 2013) (non-precedential) (7,000 to 8,000 website users **each month** over a multi-year period insufficient); *see also DeGidio v. W. Grp. Corp.*, 355 F.3d 506, 514 (6th Cir. 2004) (\$200 from online banner advertisements and click-through revenues insufficient); *Cont'l Lab. Prods., Inc. v. Medax Int'l, Inc.*, 114 F. Supp. 2d 992, 1000 (S.D. Cal. 2000) (sales of 229,000 units insufficient). Thus, RxD's sales are insufficient to meet its burden of showing secondary meaning.

The Undisputed Advertising and Media Coverage for RxD's "IPAD" Service Does Not Support Secondary Meaning: RxD does not dispute that, prior to IPAD LLC's priority date, it spent less than [REDACTED] on advertising its ipad.mobi site. (*See also* D.E. 52 at 2, 19.) Instead, seeking to create a fact issue where there is none, RxD points to a few insignificant mentions—all on obscure websites targeted to “.mobi” enthusiasts who were mostly domainers and web developers (*see supra* at 4 n.4)—none of which is sufficient (either alone or together) to support a finding of secondary meaning.

Significantly, despite acknowledging that the “ultimate test” for secondary meaning is not a party's amount of advertising, but its “success in educating the public” (Opp'n. at 21 (citing TMEP § 1212.06(b))), RxD offers **no** evidence as to how many people ever actually saw any of these internet mentions of its ipad.mobi site. This inadequate factual record cannot support a finding of secondary meaning. *See In re Steelbuilding.com*, 2003 WL 23350100, at *11 (volume of website traffic and naked ad statistics cannot support secondary meaning without proof that purchasers recognize the term as a mark); *Jewish Sephardic Yellow Pages*, 478 F. Supp. 2d at 372 (proof of advertisements, without evidence of circulation or audience, is not relevant to secondary meaning).¹⁰

assessing distinctiveness (versus just whether a mark has been “used in commerce”) the mark “must be distinctive among United States consumers.” *Int'l Bancorp LLC v. Societe de Bains de Mer et Du Cercle Des Etrangers A Monaco*, 329 F.3d 359, 370 (4th Cir. 2003); *see also Jewish Sephardic Yellow Pages Ltd. v. Dag Media, Inc.*, 478 F. Supp. 2d 340, 374 (E.D.N.Y. 2007) (considering, for purposes of secondary meaning analysis, number of U.S. viewers).

¹⁰ Without any legal support, RxD cites its website traffic statistics to argue that its advertising efforts support secondary meaning (Opp'n at 19) but RxD's **evidence** undermines its argument. (*See, e.g.*, D.E.

RxD's Period of Use Is Insufficient to Support Secondary Meaning: RxD claims that its period of use triggers the presumption of acquired distinctiveness under 15 U.S.C. § 1052(f). (Opp'n at 18). That is simply wrong. First, the presumption of secondary meaning arising after five years of continuous use is discretionary. 15 U.S.C. § 1052(f). Second, the five-year period is measured from the date on which the claim of distinctiveness is made, meaning that the alleged prior owner of a descriptive mark must show it acquired distinctiveness before its first use by another. *DeGidio v. W. Grp. Corp.*, 191 F. Supp. 2d 904, 916 (N.D. Ohio 2002). RxD cannot show that it used "ipad" for five years prior to IPAD LLC's constructive first use dates (*see supra* n.1), and thus it is not entitled to a presumption of distinctiveness, even if its use was substantially exclusive before those dates (which it was not (*see* D.E. 52 at 20)).

RxD Has No Evidence of Copying: RxD has not offered *any* evidence of copying by IPAD LLC, nor could it. The undisputed evidence shows that IPAD LLC [REDACTED] *before* RxD's alleged first use. (*See, e.g.*, D.E. 52 at 21; Opp'n at 5, 9.) Because RxD cannot show intentional copying, whether IPAD LLC knew of ipad.mobi's existence is irrelevant and does not support a finding of secondary meaning. *DeGidio*, 344 F.3d at 514 (evidence that defendant knew of plaintiff, without proof of intentional copying, was "meritless").

IV. IPAD LLC'S MOTION IS NOT PREMATURE

RxD's arguments that IPAD LLC's motion should be denied as premature are unsupported by either law or fact. *First*, RxD claims that whether its mark is distinctive should be decided by the PTO examiner assigned to its pending application.¹¹ RxD cites no support for its argument, which is nonsensical because the distinctiveness of alleged trademarks is regularly decided by the Board on summary judgment. *See, e.g., Robin Singh Educ. Servs, Inc. v. Test Masters Educ. Servs., Inc.*, 2011 WL

55, Clements Decl., Ex. 18–20 (showing that ipad.mobi traffic included *zero authenticated users* in 2009, 2012, and 2015, and the percentage of total visits lasting *less than 30 seconds* increased from 79.6% to 91.7%). *See In re Steelbuilding.com*, 2003 WL 23350100, at *11 (website traffic, without more, is irrelevant).

¹¹ This is a curious argument for RxD to make, given that the PTO examiner has already denied its pending application on grounds of descriptiveness. (D.E. 52 at 10.)

1495459, at *8 (T.T.A.B. Mar. 31, 2011); *Threshold.TV*, 2010 WL 3164750, at *6; *Interpayment Servs., Ltd. v. Docters & Thiede*, 66 U.S.P.Q.2d 1463, 2003 WL 880552, at *6 (T.T.A.B.).

Second, RxD asserts that IPAD LLC's motion for summary judgment should not be decided until after the Board has ruled on RxD's pending motion to amend its notice of opposition to allege new claims. (Opp'n at 25.) As an initial matter, RxD's motion is inexcusably delayed, futile, prejudicial, and is nothing more than a tactic designed to delay final judgment in IPAD LLC's favor. (*See generally* Opp'n to Mot. to Amend, filed concurrently herewith.) RxD has cited no precedent requiring delaying decision on IPAD LLC's summary judgment motion simply because RxD has filed an untimely motion.

Third, RxD argues that even if its mark is descriptive, it might still be able to register on the Supplemental Register, which it claims would entitle it to enforce its rights against junior users. (Opp'n at 23.) RxD again fails to cite any precedent to support its position, which is unsurprising because the law is to the contrary. *See Otter Prods. LLC v. Baseonelabs LLC*, 105 U.S.P.Q.2d 1252, 2012 WL 6798845, at *3 (T.T.A.B.) (registration on Supplemental Register, without proof of acquired distinctiveness, is insufficient to support opposition).

V. CONCLUSION

For the foregoing reasons, IPAD LLC respectfully requests that the Board grant its motion for summary judgment and dismiss RxD's consolidated oppositions in their entirety.

Dated: April 21, 2016

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Respectfully submitted,
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ATTORNEYS FOR APPLICANT
IP APPLICATION DEVELOPMENT LLC

¹ Exhibits 1–69 were attached to the Declaration of Phil Hill in Support of IPAD LLC’s Motion for Summary Judgment. (D.E. 52.)

6 (approving D.E. 5, Stipulated Protective Order) (the “Board Protective Order”)) and Paragraph 3 of the Protective Order entered by the U.S. District Court for the Northern District of California on December 8, 2015 (15-mc-80295 (N.D. Cal.), D.E. 3) at the request of Opposer RxD Media LLC (“RxD”) and non-party Apple, and those portions are redacted from the public filing.²

3. Attached as Exhibit 71 is a true and correct copy of additional excerpts from the deposition of Keith Clements as the corporate representative of RxD pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. RxD marked portions of this transcript “CONFIDENTIAL” pursuant to Paragraph 1 of the Board Protective Order, and those portions are redacted from the public filing.

4. I have reviewed the search results [REDACTED] and [REDACTED] and determined that IPAD LLC has produced over 3,000 pages of such documents in discovery in these proceedings.

5. I declare, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 21, 2016, at New York, New York.

/s/ Phil Hill

Phil Hill, Esq.

² Pursuant to Rule 412.04 of the Trademark Trial & Appeal Board of Manual of Procedure, IPAD LLC has used yellow highlighting to identify the information in the confidentially filed versions of IPAD LLC’s Reply in Support of its Motion for Summary Judgment and supporting documents that are redacted from the publicly filed versions.

RxD Media, LLC v. IP Application Development LLC
Opposition Nos. 91207333, 91207598

APPLICANT'S EXHIBIT 70

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

4	RXD MEDIA, LLC,)	
)	
5	Opposer,)	
)	
6	vs.)	Opposition No. 91207333
)	91207598
7	IP APPLICATION DEVELOPMENT)	
	LLC,)	
8)	
	Applicant.)	
9)	

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14 | TRADE SECRET AND COMMERCIALY SENSITIVE

15	UNDER PROTECTIVE ORDERS
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16 VIDEOTAPED 30 (b) (6) DEPOSITION OF APPLE INC.

DESIGNEE: THOMAS R. LaPERLE

18	Palo Alto, California
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19	Thursday, December 10, 2015
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23	Reported By:
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24 Jenny L. Griffin, CSR 3969

25	Job No.: 10020805
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RXD MEDIA, LLC,)
)
 Opposer,)
)
 vs.) Opposition No. 91207333
) 91207598
 IP APPLICATION DEVELOPMENT)
 LLC,)
)
 Applicant.)
)

Videotaped deposition of THOMAS R. LaPERLE, taken on behalf of Opposer, at Kirkland & Ellis, 3330 Hillview Avenue, Palo Alto, California, commencing at 9:00 a.m., Thursday, December 10, 2015, before Jenny L. Griffin, RMR, CRR, CSR 3969.

1 A. That's correct. Well, that's my -- I
2 definitely hadn't seen this. I don't recall seeing
3 that either. [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 [REDACTED] Is that a -- well, I'll just ask it that
8 way.

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 Q. Okay. Without revealing any privileged
16 information, did the written opinion you have
17 synopsized the underlying data?

18 MS. CENDALI: Objection to form. Vague.
19 Overbroad.

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 BY MR. KEY:

2 [REDACTED]

3 [REDACTED]

4 MS. CENDALI: Objection. Overbroad.
5 Outside the scope.

6 But you can answer.

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 BY MR. KEY:

12 Q. Okay.

13 [REDACTED]

14 [REDACTED]

15 Q. I understand.

16 Can we go back to Exhibits 12 and 13 for a
17 moment?

18 I'll start with Exhibit 12. Do you see
19 where "goods and services affected by
20 opposition" --

21 A. Yes.

22 Q. -- are listed in -- it starts on the first
23 page and goes onto the second one.

24 These are the goods and services that are
25 claimed in the IP Application Development trademark

1 application; correct?

2 A. Correct.

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 MS. CENDALI: Objection. May call for
7 legal conclusion. Outside the scope. Overbroad.

8 You may answer.

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 BY MR. KEY:

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 Q. All right.

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 Q. All right. I appreciate that. So I just

9 want to understand -- [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 If you could just briefly describe how
15 those services are rendered.

16 A. So there's part of Apple's website that
17 says, "iPad in business," and underneath that it
18 discusses all of the ways that iPad can be used
19 to -- with the programs that Cisco and IBM have for
20 various business management systems. There's both
21 services from Apple's service teams, IBM's teams,
22 and all these things are wrapped up.

23 But there's a use of the iPad in
24 business on our website. So that's a brand usage
25 of that term, I believe.

1 Q. Okay. When you mentioned -- use of
2 "iPad in business," but is that referring to the
3 device? The iPad?

4 A. That's referring to -- it is referring to
5 the device, yes, but there's services associated.
6 That's part of Apple's unique situation. They have
7 that ecosystem that has lots of services related to
8 their devices.

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 MS. CENDALI: Objection. Overbroad.
16 Outside the scope.

17 You may answer.

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 BY MR. KEY:

23 Q. That's fair enough.

24 Is there -- who at Apple would have the
25 information about the current services that have

1 been rendered under the IPAD mark?

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 Q. Okay.

7 A. Many are available on Apple.com. I
8 believe we had turned over some of the earnings
9 calls that talks about various -- turned over the
10 earnings call report on the discussions about
11 iPad in business and other -- other uses.

12 MS. CENDALI: I'm also going to -- I guess
13 object to this line on the grounds of relevance, as
14 I know counsel knows -- and at this proceeding what
15 matters is the descriptions of the goods and
16 services that Apple is applying for and not what
17 Apple has actually used to date.

18 MR. KEY: Boy, that's wrong. That ain't
19 even close to right. No.

20 MS. CENDALI: Yes, it is. This is an ITU
21 app.

22 MR. KEY: Yeah, but they also make clear
23 that discovery extends beyond the description here.

24 MS. CENDALI: Well, we'll apply it. I was
25 trying to be helpful. I clearly erred. I will not

1 continue, then.

2 MR. KEY: Okay.

3 BY MR. KEY:

4 Q. Okay. So is it fair to say, then, if --
5 whatever services have been rendered by Apple under
6 the IPAD mark, I should be able to find them
7 publicly available?

8 A. That's correct.

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 A. Yes.

13 Q. -- is -- because I'm not familiar with
14 those. [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 [REDACTED] But the website
20 that I was referring to specifically, the iPad in
21 Business website, was specifically for iPad.

22 Q. Okay. Did -- I'll ask it two ways.

23 Prior to the launch of the iPad product,
24 did Apple engage any advertising agencies to
25 advertise the iPad?

RxD Media, LLC v. IP Application Development LLC
Opposition Nos. 91207333, 91207598

APPLICANT'S EXHIBIT 71

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RXD MEDIA, LLC,

Opposer, Opposition No.

vs. #91207333

IP APPLICATION #91207598

DEVELOPMENT LLC ,

Applicant.

VOLUME II

CONFIDENTIAL - UNDER PROTECTIVE ORDER

DEPOSITION OF KEITH CLEMENTS

PHILADELPHIA, PENNSYLVANIA

December 18, 2015 - 8:49 A.M.

REPORTED BY: S. ARIELLE SANTOS, RPR, CSR, CLR

JOB NO. 15526

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CONTINUED VIDEOTAPED DEPOSITION of KEITH
CLEMENTS, held at the Regus Conference Space,
325-41 Chestnut Street, Suite 800, Philadelphia,
Pennsylvania on December 18, 2015, before S. Arielle
Santos, Registered Professional Reporter, Certified
Shorthand Reporter, Certified LiveNote Reporter
and Notary Public.

1 Do you know how the -- RxD
2 Media's service was selected for that
3 showcase?

4 A It was produced in
5 documents.

6 Q Sitting here today as the
7 designee, do you know how it was
8 selected?

9 A I know a bunch -- at a high
10 level, people -- there were tons and
11 tons of applications. I can't tell
12 you what tons was. I know tons of
13 applications came in and they decided
14 to select only a few and actually
15 Brian also -- I do remember this.

16 He also put other sites
17 outside of .mobi -- excuse me,
18 outside of the iPad, and the iPad was
19 the one that got selected.

20 Q Do you know how many sites
21 were selected to be featured?

22 A I couldn't answer that right

1 to 2011-12.

2 Do you see that?

3 A I do.

4 Q Do you know whether similar
5 documents exist for other time
6 periods?

7 A I know Brian has produced
8 every document he has had with this
9 stuff or has been requested for.

10 Q Do you know whether the data
11 shown on this page is limited to the
12 United States?

13 A I'm trying to see if it
14 shows something on there that would
15 say that. I mean, it's not showing
16 me personally here. It's the first
17 time I have seen this document in
18 this form, so I can't answer that for
19 you right now.

20 Q Okay.

■ [REDACTED]
■ [REDACTED]

[illegible]

Page 608

13 Q Let me show you what we have
14 marked as RxD 30(b)(6) Exhibit 93 --
15 (Exhibit 93 is Marked.)

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17      Q      -- which has the Bates
18      Number RXD000455 to 461.

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20 Q Have you seen these pages

21 before?

RxD Media, LLC v. IP Application Development LLC
Opposition Nos. 91207333, 91207598

APPLICANT'S EXHIBIT 72

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
3
4 RXMEDIA, LLC,
5 Opposer,
6 vs. Opposition Nos.
 91207333
 91207598
7 IP APPLICATION DEVELOPMENT
8 LLC,
9 Applicant.

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TRADE SECRET/COMMERCIALLY SENSITIVE
PURSUANT TO PROTECTIVE ORDERS

DEPOSITION OF DOUGLAS G. VETTER
Palo Alto, California
Wednesday, February 10, 2016

Reported by:
Cynthia Manning
CSR No. 7645, CLR, CCRR

Job No. 10021923

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RXMEDIA, LLC,

Opposer,

vs.

IP APPLICATION DEVELOPMENT
LLC,

Applicant.

Opposition Nos.
91207333
91207598

Deposition of DOUGLAS G. VETTER, taken on behalf of Opposer, at Kirkland & Ellis LLP, 3330 Hillview Avenue, Palo Alto, California, beginning at 12:56 p.m., February 10, 2016, before Cynthia Manning, Certified Shorthand Reporter No. 7645, Certified LiveNote Reporter, California Certified Realtime Reporter.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 Q. At what point did you move from being chief
13 sales counsel to chief product counsel?

14 A. July of 2013.

15 Q. And from January 2010 until January 2013,

16 [REDACTED]
17 [REDACTED]

18 MS. CENDALI: Objection to form.

19 You may answer.

20 [REDACTED]

21 BY MR. KEY:

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 A. Correct.

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 Q. Sorry?

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 MS. CENDALI: Again, this is an ongoing

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPLICANT IP APPLICATION DEVELOPMENT LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT was filed electronically on this 21st day of April, 2016, and a copy was electronically mailed to the following:

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/s/ Allison W. Buchner
Allison W. Buchner